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UNITED STATES DISTRICT COURT

DISTRICT OF GUAM

U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, Plaintiff, v. LEO PALACE RESORT, Defendant.	Case No.: 2:06-CV-00028
	REPLY IN SUPPORT OF PLAINTIFF EEOC'S MOTION FOR PARTIAL SUMMARY JUDGMENT
	Trial Date: December 4, 2007
JENNIFER HOLBROOK; VIVIENE VILLANUEVA; and ROSEMARIE TAIMANGLO, Plaintiff-Intervenors, v. MDI GUAM CORPORATION d/b/a LEO PALACE RESORT MANENGGON HILLS and DOES 1 through 10, Defendants.	

REPLY IN SUPPORT OF MOTION FOR PARTIAL SUMMARY JUDGMENT

I. INTRODUCTION

Plaintiff Equal Employment Opportunity Commission's ("EEOC") motion for partial summary judgment should be granted and Defendant Leo Palace Resorts' ("Leo Palace" or "Defendant") affirmative defenses 1-7, 10, 13-14, 16, 19-20, and 23[1] should be dismissed. In its Opposition, Defendant withdrew its first and second affirmative defenses. (Def.'s Opp'n to Pl. EEOC's Mot. for Partial Summ. J. ["Def.'s Opp'n"] [Court Doc. # 100] at 2.) Defendant failed to address EEOC's arguments regarding Affirmative Defense 14 and so implicitly concedes the defense. Affirmative Defenses 3

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[1] Defendant's Affirmative Defenses 1-7, 10, 13-14, 16, 19-20 and 23 are as follows: (1) The Complaint is barred by the applicable statute(s) of limitations; (2) The Complaint fails to state a claim upon which relief can be granted; (3) EEOC claimants . . . were each contributorily negligent; (4) The Claimants consented to the conduct of which they complain; (5) The Claimants encouraged the co-employee who was allegedly harassing them to engage in sexual banter; (6) The alleged harassment was mutually engaged in between the Claimants and the alleged harassing co-employee; (7)Claimant Rose Taimanlgo was the direct supervisor of the allegedly harassing co-employee and had full authority to warn and/or discipline her; (10) The Claimants resigned their jobs, at Leo Palace on the advice of their attorney, not because they were constructively discharged; (13) The Claimants resigned their employment at Leo Palace after they were fully aware that LeoPalace had terminated the employee who was allegedly harassing them; (14) The Complaint's constructive discharge count is barred by the doctrine of avoidable consequences; (16) No tangible employment action was taken by Leo Palace or by any supervisor against the Claimants; (19) Leo Palace did not discriminate against the claimants on account of sex; (20) Leo Palace took no action that it would not otherwise have taken in the absence of any impermissible motivating factor; and (23) Leo Palace warned and then terminated the employee who was allegedly harassing the Claimants.

and 4 are unavailable to Defendant because they are not affirmative defenses to Title VII intentional discrimination claims and no factual basis exists for Defendant to assert the defenses. Affirmative Defenses 5-7, 10, 13, 16, 19-20 and 23 merely deny or attack EEOC's allegations and, therefore, fail to state an affirmative defense as a matter of law.

Contrary to Defendant's contentions, Plaintiff's motion is not merely for procedural or aesthetic reasons, Plaintiff's motion seeks to minimize confusion at trial for the jury when Defendant seeks to present certain arguments as affirmative defenses when they are not. For example, certain facts which may suggest sexual banter do not constitute a "defense" to defeat EEOC's entire claim when all the facts taken together constitute a hostile work environment. Whether Defendant's arguments and evidence are admissible depends on their relevance to the elements of Plaintiff's sexually hostile work environment claim

II. ADDITIONAL BACKGROUND[2]

As set forth in EEOC's Motion for Partial Summary Judgment, EEOC alleges, in part, that Leo Palace subjected to Plaintiff-Intervenors Jennifer Holbrook, Rosemarie Taimanglo, and Viviene Villanueva to a hostile work environment based on their sex. Specifically, EEOC alleges that Plaintiff-Intervenors' co-worker, Christine Camacho, sexually harassed them both physically and verbally. (Morrison Decl. in Supp. of Pl. EEOC's Mot. for Partial Summ. J. [Court Doc. #93], Ex. 1.)

Plaintiff-Intervenors complained about Camacho's harassing behavior or told Camacho to stop. Ms. Villanueva and Ms. Taimanglo complained to Leo Palace managers and other supervisors about Camacho's sexually harassing behavior as early as June 2004. Ms. Villanueva told several supervisors about Camacho's physical attack on her in June. (Decl. of Angela Morrison in Supp. of Reply in Supp. of Pl. EEOC's Mot.

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[2] EEOC presents additional background because Defendant argued in its Opposition that the facts suggest consent. (Def.'s Opp'n at 3-4.) However, there is no genuine issue of material fact that the Charging Parties did not consent to the sexual harassment. (*See infra* at pp.6-7.)

for Partial Summ. J. ["Morrison Decl."], Ex. 1 at 23:17-25:6; *see also* Decl. of Tim Roberts in Supp. of Def. LeoPalace's Opp'n to EEOC's Mot. for Partial Summ. J. ["Roberts Decl."] [Court Doc. #101], Ex. 2 at Paulino Dep. Ex. 10 .) Ms. Taimanglo and Ms. Villanueva both complained to the front desk night supervisor, Greg Perez, that Camacho had physically assaulted Ms. Villanueva. (Morrison Decl., Ex. 2 at 44:12-18; *id.* at 25:5-6.)

Ms. Taimanglo complained to other managers about the Villanueva incident and Camacho's other sexually harassing behavior in June and July 2004. Ms. Taimanglo complained to Satoshi Suzuki about Camacho's sexually inappropriate behavior in June 2004. (*Id.*, Ex. 3 at 62:2-22; 73:6-74:11, 94:3-14; *id.*, Ex. 4 at 41:20-23, 87:1-8; Morrison Decl. in Supp. of Pl. EEOC's Mot. for Partial Summ. J., Ex. 3 at 10, Req. for Admis. No. 34.) Ms. Taimanglo complained to Hideo Iijima about Camacho's sexually inappropriate comments to a guest. (Morrison Decl., Ex. 3 at 78:24-13.) Ms. Taimanglo told Greg Perez that "[Camacho's] behavior with the customers were of a sexual nature, especially one incident, and that the other girls were complaining about [Camacho], about her [sexual] aggressiveness toward them." (*Id.*, Ex. 2 at 44:12-18.) Ms. Taimanglo complained to May Paulino, the human resources manager, about the harassing behavior on July 1, 2004. (*Id.*, Ex. 3 at 55:15-25, 77:4-21; Morrison Decl. in Support of Pl. EEOC's Mot. for Partial Summ. J., Ex. 3 at 11, Req. for Admis. No. 37.) During July 2004, Ms. Taimanglo repeatedly asked management what they were going to do about Christina Camacho's sexually harassing behavior. (Morrison Decl., Ex. 3 at 85:17-95:6.)

Ms. Taimanglo, Ms. Villanueva, and Ms. Holbrook reacted to Camacho's harassing behavior by telling her to stop or telling her that her behavior made them uncomfortable. Camacho testified that Ms. Taimanglo sometimes told her "I think that's enough Christina." (Roberts Decl., Ex. 1 at 52:20-25; *see also id.*, Ex. 1 at 78:3-13; 114:8-21; *id.*, Ex. 2 at Paulino Dep. Ex. 7.) Ms. Taimanglo told Camacho not to engage in inappropriate sexual behavior in the workplace. (Morrison Decl. in Supp. of Pl. EEOC's Mot. for Partial Summ. J., Ex. 3 at 11, Req. for Admis. No. 38.) Camacho also

testified that Ms. Villanueva told her that she was making her uncomfortable. (Roberts Decl., Ex. 1 at 90:20-23; *see also* Morrison Decl., Ex. 1 at 22:15-18.) Ms. Holbrook likewise told Camacho to stop and that Camacho's actions made her uncomfortable. (Roberts Decl., Ex. 2 at Paulino Dep. Exs. 8 & 9; Morrison Decl., Ex. 5 at 38:8-9, 48:23-49:5.) In their depositions, Ms. Holbrook, Ms. Taimanglo, and Ms. Villanueva stated they sometimes laughed at Camacho's non-sexual, inoffensive jokes but not at Camacho's statements or jokes that were sexually offensive. (Morrison Decl., Ex. 3 at 87:22-88:3; Ex. 1 at 32:9-10; Ex. 5 at 58:19-59:9.)

In August 2004, Ms. Holbrook and Ms. Taimanglo complained again to Ms. Paulino about Christina's sexually harassing behavior. (Roberts Decl., Ex. 2 at Paulino Dep. Exs. 7, 9.) On or about December 24, 2004, Plaintiff-Intervenors each filed a Charge of Discrimination with the EEOC. (Morrison Decl., Ex. 6.) Ultimately, EEOC filed the instant lawsuit in which Ms. Taimanglo, Ms. Holbrook, and Ms. Villanueva have intervened.

III. ARGUMENT

A. Defendant did not Address EEOC's Motion Regarding Affirmative Defense 14 (Doctrine of Avoidable Consequences)

In its Opposition, Defendant did not address Plaintiff's motion for partial summary judgment on affirmative defense fourteen. (Def.'s Opp'n.) By not addressing it, Defendant concedes to the merits of Plaintiff's motion. Thus, Plaintiff's motion for partial summary judgment should be granted on affirmative defense fourteen.

B. The Affirmative Defenses 3 (Contributory Negligence) and 4 (Consent) are Inapplicable to Title VII Claims & No Factual Basis Exists on Which to Assert Them

1. As a Matter of Law, the Affirmative Defenses of Contributory Negligence and Consent are Inapplicable to Title VII Claims

Defendant's allegations of contributory negligence and consent by Plaintiff-Intervenors do not constitute affirmative defenses to Title VII claims for intentional

discrimination. Contributory negligence is a partial defense to a defendant's negligence. *See* Restatement (2d) Torts § 463. However, EEOC's claims are not negligence claims. EEOC alleges intentional discrimination claims under Title VII. *See* 42 U.S.C. 1981(a) (characterizing claims under Title VII as claims for "unlawful intentional discrimination" unless the claim is for "an employment practice that is unlawful because of its disparate impact"). Likewise, consent is a defense to battery, an intentional tort. *Nelson v. City of Irvine*, 143 F.3d 1196, 1207 (9th Cir. 1998). EEOC has not alleged tort claims but rather statutory claims of intentional discrimination under Title VII. Accordingly, as a matter of law, a Defendant may not assert contributory negligence and consent as affirmative defenses to Title VII sexual harassment and retaliation claims because Title VII claims are not tort claims.

Defendant also claims that consent or voluntariness is an affirmative defense because a "claimant's voluntary participation in mutual vulgar behavior is a defense to a Title VII claim." (Def.'s Opp'n at 3). To assert a prima facie case of sex harassment, a plaintiff must demonstrate, in part, that the harassment was "unwelcome." *See Nichols v. Azteca Rest. Enters.*, 256 F.3d 864, 873 (9th Cir. 2001) (citations omitted) This does not, however, permit a defendant to plead consent as an affirmative defense because consent explicitly addresses an element of plaintiff's proof, rather than constituting "an assertion raising new facts and arguments that, if proven, defeat the plaintiff's claim even if the allegations in her complaint are true." *Sterten v. Option One Mortg. Corp.*, 479 F. Supp. 2d 479, 482-83 (E.D. Pa. 2007).

Further, Defendant failed to cite to any authority that supports the application of tort affirmative defenses to non-tort claims, let alone to claims for intentional discrimination under Title VII. Because contributory negligence and consent are not affirmative defenses to intentional discrimination claims under Title VII, Defendant, not surprisingly, did not cite to any authority which has allowed an affirmative defense of contributory negligence or consent in a Title VII case.

2. No Factual Basis Exists on which to Base Affirmative Defenses of Consent and Contributory Negligence

Moreover, even if consent or contributory negligence were affirmative defenses to a Title VII sexual harassment claim, which EEOC does not concede, Defendant has not demonstrated that a genuine issue of material fact exists that Plaintiff-Intervenors consented or contributed to Camacho's harassing behavior. Defendant's citation of out-of-circuit authority is misplaced because it does not state the relevant standard that the Ninth Circuit Court of Appeals has applied to whether sexually harassing behavior is unwelcome. (Def.'s Opp'n at 3 [citing *Loftin-Boggs v. Madison*, 633 F. Supp. 1323, 1327 (S.D. Miss. 1986); *Gan v. Kerpo Circuit Sys., Inc.*, 1982 U.S. Dist LEXIS 10842 (E.D. Mo.)].)

First, *Loftin-Boggs* and *Gan* do not recognize consent, voluntariness, or contributory negligence as affirmative defenses to Title VII claims but rather allow evidence of whether the harassment was unwanted to rebut Plaintiff's prima facie case. Second, as discussed above, the Ninth Circuit treats whether the sexually harassing behavior was unwelcome as an element of Plaintiff's prima facie case for sexual harassment, not as a separate affirmative defense. Third, the Ninth Circuit has held that a Plaintiff demonstrates the sexually harassing behavior was unwelcome by adducing evidence that the victim complained about the behavior. In *Nichols*, the Ninth Circuit found that the plaintiff had demonstrated that frequent verbal abuse was unwanted because he had complained about it. *Nichols*, 256 F.3d at 873. The court determined that the victim's mutual horseplay with his harassers did not mean that the harassment was wanted:

> the fact that not all of [plaintiff's] interactions with his harassers were hostile does not mean that none of them was. As any sensible person would, [plaintiff] drew a distinction between conduct he perceived to be objectionable, and conduct that was not. He viewed horseplay as "male bonding" and excluded it from his hostile environment claim; he viewed

relentless verbal affronts as sexual harassment, and sought legal recourse for that conduct.

Id. at 873-74. Therefore, in the Ninth Circuit, it is the victim's view of the harassment and his or her conduct in relation to it, for example, whether the victim complained, that determines whether the harassment was wanted.

Here, Plaintiff-Intervenors, like the sexual harassment victim in *Nichols*, drew a distinction between behavior that was harassing and conduct that was not. All of the Plaintiff-Intervenors testified that while they laughed at Camacho's non-sexual, inoffensive jokes, they did not laugh at Camacho's sexually offensive jokes. (*Supra* at p. 4.) Similarly, like the victim in *Nichols*, Plaintiff-Intervenors complained about Camacho's harassing behavior or told Camacho to stop. (*Supra* at pp. 2-4.) Further, they sought legal recourse for the sexual harassment by filing charges of discrimination with the EEOC and intervening in this suit. (*Supra* at p. 4.) Because Plaintiff-Intervenors complained about Camacho's conduct and demonstrated by their reactions to the harassment that it was unwanted, there is no genuine issue of material fact regarding whether Camacho's sexual harassment was unwelcome.

Defendant has no legal basis to assert consent or contributory negligence as an affirmative defense, and no factual basis to support an affirmative defense of consent or contributory negligence. Therefore, Plaintiff's motion for partial summary judgment on the affirmative defenses of consent and contributory negligence should be granted.

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C. Affirmative Defenses 5 (Intervenors' Encouraged Harasser), 6 (Mutual Engagement in Harassment), 7 (Ms. Taimanglo had Supervisory Authority over Harasser), 10 (Resignation on Advice of Counsel), 13 (Resignation after Termination of Harasser), 16 (No Tangible Employment Action), 19 (No Discrimination on Account of Sex), 20 (No Action that Would Have Been Taken in the Absence of Impermissible Motivating Factor), and 23 (Leo Palace Warned and Terminated Harasser) are Contentions attacking EEOC's Causes of Action and thus Fail to State an Affirmative Defense

Defendant concedes that Affirmative Defenses 5, 6, 7, 10, 13, 16, 19-20, and 23 are "not traditional 'affirmative defenses[,]'" but claims that they are matters constituting an avoidance and so were pled properly. (Def.'s Opp'n at 5.) A confession and avoidance is "[a] plea in which a defendant admits allegations but pleads additional facts that deprive the admitted facts of an adverse legal effect." *Black's Law Dictionary* (8th Ed. 2004) (noting that a confession and avoidance is also termed an avoidance).

Here, Affirmative Defenses 5, 6, and 7 are contentions that deny EEOC's first element of proof of a hostile work environment, i.e., that the conduct was unwelcome. (*See* Morrison Decl. in Supp. of Pl. EEOC's Mot. for Partial Summ. J., Exs. 1 & 2.) Affirmative Defenses 19 and 20 are contentions that deny the second element of Plaintiff's prima facie case for hostile work environment, i.e., that the conduct was because of sex. (*Id.*) Affirmative Defenses 10, 13, and 16 address whether Plaintiffs suffered a tangible employment action as a result of a supervisor's harassment, an element that EEOC would be required to prove for strict liability to attach to Defendant. (*Id.*) Finally, Affirmative Defense 23 is a factual contention that would go to whether Leo Palace is liable for co-worker harassment by denying that Leo Palace failed to take appropriate remedial measures. (*Id.*) Hence, Leo Palace's Affirmative Defenses 5, 6, 7, 10, 13, 16, 19-20, and 23 are not matters constituting an avoidance because instead of admitting the allegations in EEOC's complaint but pleading additional facts that deprive

the admitted facts of their adverse legal effect, the Affirmative Defenses merely deny or rebut EEOC's allegations.

Defendant also argues that the Affirmative Defenses should stand because "it is safer for LeoPalace to plead anything that might be deemed an affirmative defense as such, rather than risk inadvertently waiving an issue." (Def.'s Opp'n at 5.) Nonetheless, "[w]here . . . any matter is so plainly put into issue by being embraced within the existing pleadings . . ., the responsive pleader is not justified in inserting a putative [affirmative defense] out of some super abundance of caution." *Gwin v. Curry*, 161 F.R.D. 70, 71 -72 (N.D. Ill. 1995) (internal citation omitted). As discussed above, the contentions in Leo Palace's affirmative defenses 5, 6, 7, 10, 13, 16, 19-20, and 23 rebut or deny EEOC's allegations and, therefore, the matters they address have been put into issue by being embraced the pleadings. Because none of Leo Palace's Affirmative Defenses 5-7, 10, 13, 16, 19-20, and 23, is an affirmative defense or an avoidance as a matter of law, the affirmative defenses should be dismissed.

V. CONCLUSION

For the foregoing reasons, Plaintiff requests the Court to grant Defendant's Motion for Partial Summary Judgment and dismiss Defendant's Affirmative Defenses 1-7, 10, 13-14, 16, 19-20, and 23.

Date: November 13, 2007

United States Equal Employment Opportunity Commission

By: _____
Angela Morrison
Attorneys for Plaintiff